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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CARLOS MANUEL HERNANDEZ, Defendant and Appellant.	D073581 (Super. Ct. No. JCF38052)

APPEAL from a judgment of the Superior Court of Imperial County, Marco D. Nuñez, Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Carlos Manuel Hernandez guilty of inflicting injury on a spouse or cohabitant, victim Y.T. (Pen. Code,[1] § 273.5, subd. (a), count 1); interfering with a wireless communication device (§ 591.5, count 3); and simple battery of a spouse or cohabitant (§ 243, subd. (e)(1), count 4.) The court sentenced defendant to three years formal probation.

On appeal, defendant argues the trial court prejudicially erred with respect to two evidentiary rulings. First, defendant argues the court erred in refusing to admit a social services report in which Y.T. allegedly lied and instructed their daughter, Y., to falsely allege sexual abuse by defendant's former girlfriend, A.M. Second, he argues the court erred in admitting statements their teenage son, C., made to a police officer immediately after the domestic violence incident, claiming such statements allegedly constituted testimonial hearsay due to their son's unavailability. As we explain, we reject both arguments and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Defendant and Y.T. engaged in an on-again, off-again relationship for over 12 years. They have three children, and shared a home. On June 19, 2017, Y.T. became angry when she believed defendant was communicating with A.M. Fearing for her own safety and the safety of their children, who were home at the time, Y.T. hid

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1 Unless otherwise noted, all further statutory references are to the Penal Code.

2 We summarize the facts in the light most favorable to the prosecution. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain facts relevant to claims of error are discussed *post*.

defendant's gun under a mattress. When defendant arrived home, Y.T. confronted him about his communication with A.M. The confrontation turned violent when Y.T. slapped defendant. Defendant then grabbed Y.T., threw her on the bed, and punched her in the face. Y.T. yelled out to C., handed him a cellphone, and instructed him to call police. Defendant pursued C., pushed him to the floor, and, after a brief struggle, wrestled the phone away. Defendant then left the scene in a car.

During the confrontation, Y. went to a neighbor's house and called 911. A recording of this call was played for the jury. In the call, Y. told a police dispatcher that her dad had hit her mom, and her mom had hidden her dad's gun.

Imperial Police Department Officer Carmen Fierro was the first to arrive at the scene. Officer Fierro knew from the dispatch that she was approaching a domestic violence situation where children, and possibly a gun, were present. After parking her patrol car, Officer Fierro approached the home and came upon C., who was standing in the driveway. C. was visibly upset. In an attempt to assess the safety of the scene and gather information regarding the whereabouts of victims, witnesses, and the suspect, Officer Fierro briefly questioned C. As they were talking, C. pointed to a car approaching the home and stated, "that's my dad in that car."

As defendant drove past, he made eye contact with Officer Fierro, who ordered him to stop. Defendant complied, but then became argumentative and refused Officer Fierro's command to step out of the car. Officer Fierro in response took hold of defendant's arm and ushered him out of the car. At the same time, Y.T. came outside,

pointed at defendant, and yelled that defendant had pushed and struck her. Officer Fierro ordered Y.T. back inside the home while she waited for backup.

After other officers arrived, Officer Fierro entered the home and spoke with Y.T. and C. Officer Fierro observed bruising to Y.T.'s arm and lip. Another officer spoke with defendant, who admitted to arguing with Y.T., but claimed Y.T. had attacked him and had scratched his face.

DISCUSSION

I

The Trial Court Properly Excluded the Social Services Report

A. Additional Facts

Before trial, defense counsel argued that Y.T. had a history of dishonesty and wrongly accusing defendant of serious charges, including those involving A.M. As proof of this allegation, defense counsel sought to introduce a social services report from prior years. The report, which was included in the appellate record, purportedly contained information that Y. had falsely accused A.M. of sexual assault after being coached by Y.T. to lie to social workers.

The record shows the trial court ruled defendant could testify to the contents of the report if he took the stand at trial, but refused to admit the report into evidence. In making this determination, the court found the report did not conclude Y.T. and/or Y. had "made any false accusations." After tacitly finding the report's relevance to be

marginal at best,[3] the trial court also found its admission would confuse the jury and consume "a lot of time" for purposes of Evidence Code section 352.[4]

B. Applicable Law and Analysis

We review relevancy and Evidence Code section 352 rulings for abuse of discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) Discretion is abused under these statutes where the trial court acts " 'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 (*Rodrigues*).) "A trial court abuses its discretion when its ruling '[falls] "outside the bounds of reason." ' " (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

As noted *ante*, defendant argues the trial court abused its discretion in refusing to admit the social services report into evidence. (See, e.g., Evid. Code, § 1103, subd.

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3 Evidence Code section 350 states: "No evidence is admissible except relevant evidence."

4 Evidence Code section 352 provides the trial "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

(a)[5].) Defendant argues the report itself was admissible to show Y.T.'s character to prove her conduct at the time of the charged crime. We find this argument unavailing.

We conclude the court properly exercised its broad discretion under Evidence Code sections 350 and 352 when it found the social services report had minimal probative value, inasmuch as the report included no specific finding that Y.T.'s accusations were false; and when it also found the probative value of admitting the report in its entirety was outweighed by the probability its admission would require undue consumption of time and confuse the jury. (See *Rodrigues, supra,* 8 Cal.4th at pp. 1124–1125.)

However, as an exercise of its broad discretion, while properly refusing to admit the report itself, the court elected to take a middle-ground approach and agreed that if defendant testified, he could address the contents of the report and what he perceived was Y.T.'s character or trait for untruthfulness, including with respect to her feelings about defendant's "relationship" with A.M. In so doing, the court thus minimized the potential prejudice to defendant by excluding the report itself from evidence.

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5 Evidence Code section 1103 provides in part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)."

Furthermore, we agree with the People's contention that, even if the court erred in excluding the report, it was harmless. " 'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]. . . .'

"It follows, for the most part, that the mere erroneous exercise of discretion under such 'normal' rules does not implicate the federal Constitution. Even in capital cases, we have consistently assumed that when a trial court misapplies Evidence Code section 352 to exclude defense evidence, . . . the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 [(*Watson*)] (error harmless if it does not appear reasonably probable verdict was affected). [Citations.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

Here, defendant is unable to demonstrate the error was prejudicial under *Watson*. Indeed, defendant testified Y.T. had a history of asserting false allegations and trying to "get [him] in trouble." Although the jury was not permitted to view the social services report itself, it was able to hear that Y.T. had made serious accusations in the past against defendant, including with respect to A.M.

The record also shows the defense in closing argued that Y.T. and C., not defendant, were the aggressors in the incident, and that defendant did nothing more than necessary to protect himself. As the trier of fact, the jury was entitled to accept

defendant's version of what happened, or, as turned out to be the case here, reject it. We thus conclude that, even if excluding the social services report was error, defendant cannot show that error would have resulted in a more favorable outcome. (See *Watson*, *supra*, 46 Cal.2d. at p. 836.)

II

The Trial Court Properly Admitted the Nontestimonial Statements of C.

A. Additional Facts

In a motion in limine, defense counsel moved to exclude statements C. made to Officer Fierro when she arrived at the scene, contending the statements were testimonial hearsay and barred by the confrontation clause of the Sixth Amendment, which grants a criminal defendant the right to confront adverse witnesses. (U.S. Const., 6th Amend.)

As noted *ante*, Officer Fierro was the first to arrive at the scene, about five minutes after the 911 call. As noted, Y. had called 911 from a neighbor's home and reported the incident. Y. told the dispatcher there were two other children in the home, including her three-year-old sister. She also informed dispatch there was a gun inside the home. Acknowledging the dangerous nature of the situation, Officer Fierro testified she approached the first person she saw upon arrival, C., to assess the scene.

Officer Fierro, who was alone on patrol, testified that C. appeared upset and had been crying. Seeking to obtain information about the incident, she asked C. what had happened. C. told the officer his father had hit his mother. According to Officer

Fierro's testimony, C. then "just continued talking," stating that he heard his parents arguing inside the bedroom, and that he went into their bedroom to try and make them stop.

Officer Fierro also asked C. about the gun. C. confirmed "his dad owned a gun, but he wasn't sure if his dad had it" on him. She testified that their entire conversation lasted about one minute and that she then did not take any notes of their short conversation.

The record shows that, after the incident, the People made many attempts to locate Y.T. and the children. Ultimately, those attempts were unsuccessful, and the court deemed them unavailable at trial.[6]

B. Applicable Law

The confrontation clause of the Sixth Amendment prevents admission of out-of-court statements made by a declarant who is not available for cross-examination *if* the statements were testimonial in nature. (*Crawford v. Washington* (2004) 541 U.S. 36, 38, 53.) In general, statements recorded by law enforcement officers in the course of investigating a crime are testimonial, and thus subject to the confrontation clause, when the statements were elicited in an effort to collect evidence to be used in the later prosecution of a crime. (See *Davis v. Washington* (2006) 547 U.S. 813, 830–831 (*Davis*).) However, statements made to law enforcement officers responding to

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6 Y.T., however, did appear at defendant's sentencing in an attempt to recant her statements from the preliminary hearing.

an ongoing event, in which the officers are attempting to determine what, if any, action they should take, are not testimonial and thus, are not barred by the confrontation clause. (*Id.* at pp. 828–829.)

As we stated in *People v. Nelson* (2010) 190 Cal.App.4th 1453, 1464–1465 (*Nelson*): "[S]tatements in response to police inquiries at the crime scene are not testimonial if the inquiries were designed to ascertain whether there was an ongoing threat to the safety of the victim, the officers, or the public. (See *Davis*, *supra*, 547 U.S. at pp. 829, 831–832; *People v. Romero* (2008) 44 Cal.4th 386, 422 [(*Romero*)].) For example, questioning a victim to identify a perpetrator for purposes of immediate apprehension of the perpetrator for safety reasons does not yield a testimonial statement. (*Romero*, at p. 422 [statements 'are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator'].)

"In *Romero*, the court concluded a victim's statements to the police at the crime scene were nontestimonial under circumstances where the agitated victim described an assault that had just occurred, and a few minutes later identified the perpetrators whom the police found hiding nearby. (*Romero, supra,* 44 Cal.4th at pp. 421–422.) *Romero* reasoned the 'statements provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators. . . . The primary purpose of the police in asking [the victim] to identify whether the detained

individuals were the perpetrators, an identification made within five minutes of the arrival of the police, was to determine whether the perpetrators had been apprehended and the emergency situation had ended or whether the perpetrators were still at large so as to pose an immediate threat.' (*Id.* at p. 422.)

"In contrast, statements that are initially nontestimonial may evolve into testimonial statements if the immediate danger has ended and the questioning continues to elicit details about what happened. (See *Davis, supra,* 547 U.S. at pp. 817, 828–829 [following initial nontestimonial statements, 911 caller's statements may have become testimonial once the caller reported that the assailant (her former boyfriend) had driven away and the operator 'proceeded to pose a battery of questions'].) Likewise, statements are testimonial if they are in response to police interrogation that occurs after the emergency has been resolved and where there is no immediate need to identify or apprehend a perpetrator. (See [*id.*] at pp. 829–830.)"

On appeal, we independently review whether an otherwise admissible pretrial hearsay statement was testimonial such that its admission would violate the confrontation clause. (*Nelson*, *supra*, 190 Cal.App.4th at p. 1466.) With these principles in mind, we turn to the present case.

C. Analysis

In light of *Davis*, *Romero*, and *Nelson*, we conclude the statements C. made to Officer Fierro upon the officer's arrival at the scene were nontestimonial, as the statements were made in connection with a "contemporaneous emergency" in which

their "primary purpose" was to allow law enforcement to "assess[] the situation, deal[] with threats, [and/]or apprehend[] a perpetrator." (See *Romero*, *supra*, 44 Cal.4th at p. 422.)

Indeed, the record shows that Officer Fierro was the first officer to arrive at the scene; that she was alone when she approached C., who was in the driveway of the house; that C. appeared upset and had been crying as a result of the incident between his father and mother; that dispatch had informed the responding officers that there were children present during the incident, and that defendant owned a gun; that Officer Fierro spoke to C. for less than a minute as events were unfolding; that during their short interaction, C. identified defendant as he drove past them; and that Officer Fierro waited until after backup arrived and the scene was secure to then question Y.T. and C. about the incident. We thus independently conclude the court properly admitted the statements C. made to Officer Fierro during their less than one-minute conversation.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

DATO, J.

GUERRERO, J.